

IN THE
Supreme Court of the United States

Supreme Court, U. S.

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October Term, 1977

No.

77-1748

McCULLOCH GAS PROCESSING CORPORATION,

Petitioner,

vs.

CANADIAN HIDROGAS RESOURCES, LTD., a Canadian corporation; **HIDROGAS, LTD.,** a Canadian corporation; **HIDROGAS, INC.,** a Montana corporation; **EVAN W. G. BODRUG,** President of **CANADIAN HIDROGAS RESOURCES, LTD.,** **HIDROGAS, LTD.** and **HIDROGAS, INC.;** **WILLIAM C. ARNTZ,** Regional Administrator, Federal Energy Administration, Region IX, and the **UNITED STATES OF AMERICA,**

Respondents.

Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States.

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June 8, 1978.

SUBJECT INDEX

	Page
Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States	1
Opinions and Orders Below	2
Jurisdictional Statement	2
Questions Presented	4
Federal Constitutional Provision and Statutes Involved	5
Statement of the Case	5
1. Claim for Damages Against the United States	5
Proceedings Below	8
Reasons for Granting the Writ	11
1. TECA's Decision Below Conflicts With This Court's Decision in Regional Rail, With TECA's Owr Decision in Griffin and With the Decisions of Several Courts of Appeals Construing Similar Statutory Language	11
2. TECA's Decision Below Conflicts With the Decisions of Several Courts of Appeals as to the Availability of an Action for Damages Against the United States Occasioned by a Denial of Due Process of Law	20
3. This Case Presents to This Court a Rare Opportunity to Review Novel Issues of Major and Continuing Importance in the Administration of the Nation's Energy Controls and to Exercise Supervision Over TECA	29
Conclusion	30

ii.

INDEX TO APPENDICES

	Page
Appendix A. Order of the United States District Court for the Central District of California, July 12, 1977App. p.	1
Appendix B. Order of the United States District Court for the Central District of California, October 18, 1977	3
Appendix C. Opinion of the Temporary Emergency Court of Appeals of the United States, May 9, 1978	5
Appendix D. Federal Constitutional Provision, Statutes and Rules Involved	19
United States Constitution, Fifth Amendment	19
5 USC 702	19
12 USC 1904 note Sections 210 and 211	20
15 USC 754(a)(1)	26

iii.

TABLE OF AUTHORITIES CITED

Cases	Page
Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977)	26
Atlantic Richfield Co. v. Federal Energy Administration, 556 F.2d 542 (TECA 1977)	16, 18
Ballard v. Laird, 6 CCH Employment Practices Decisions ¶8793 at 5404 (S.D. Cal. 1973)	25, 26
Bell v. Hood, 327 U.S. 678 (1946)	22, 23, 26, 28
Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics (Bivens), 403 U.S. 388 (1971)	20, 21, 22, 24, 26, 28
Blanchette v. Connecticut General Insurance Corps. (see "Regional Rail Reorganization Act Cases")	11
Brennan v. Udall, 399 F.2d 803 (10th Cir. 1967)	19
California v. Sanders, U.S., 97 S.Ct. 980 (1977)	4
Cherokee Nation v. Southern Kansas R. Co., 135 U.S. 641 (1890)	11
Cheyenne River Sioux Tribe v. Andrus (8th Cir. 1977) 566 F.2d 1085	25
Continental Grain Co. v. Barge FBL-585, 364 U.S. 19 (1960)	30
Davis v. Passman, 571 F.2d 793 (5th Cir. 1978) ..	20
Eastern Kentucky Welfare Rights Org. v. Simon, 506 F.2d 1278 (D.C. Cir. 1974) rev'd on other grounds, 426 U.S. 26 (1976)	19

	Page
Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716 (7th Cir. 1975)	20
Fortnightly Corp. v. United Artists Television, 392 U.S. 390 (1968)	30
Gemsco, Inc. v. Walling, 324 U.S. 244 (1945)	16
Gentile v. Wallen, 562 F.2d 193 (2nd Cir. 1977) ..	20
Griffin v. United States, 537 F.2d 1130 (TECA), cert. denied, 429 U.S. 919 (1976)	3, 9, 10, 12 13, 14, 15, 16, 17, 24, 28, 29
International Engineering Company, Division of A-T-O, Inc. v. Richardson, 512 F.2d 573 (D.C. Cir. 1975), cert. denied, 423 U.S. 1048 (1976)	19
Jacobs v. United States, 290 U.S. 13 (1933)	25
Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353 (9th Cir. 1977), certiorari granted June 5, 1978, sub nom. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, No. 77-1327	20
J.I. Case Co. v. Borak, 377 U.S. 426 (1964)	22, 24
Kingsbrook Jewish Medical Center v. Richardson, 486 F.2d 653 (2nd Cir. 1973)	19
Kletschka v. Driver, 411 F.2d 436 (2nd Cir. 1969)	19
Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977)	20
Mahoney v. Waddle, 564 F.2d 1018 (3rd Cir. 1977)	20
McKenzie v. United States, 536 F.2d 762 (7th Cir. 1976)	18

	Page
Monell v. Department of Social Services of the City of New York,	U.S. (June 6, 1978) 27, 28
Monroe v. Pape, 365 U.S. 167 (1961)	26, 27
National Association for the Advancement of Colored People v. New York, 413 U.S. 345 (1973)	25
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974)	9, 11, 12, 13, 14, 15, 17, 27, 28
Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C.Cir. 1970)	18
Schlafly v. Volpe, 495 F.2d 273 (7th Cir. 1974)	19
South Carolina v. Katzenbach, 383 U.S. 301 1977) 566 F.2d 1085	25
States Marine Lines, Inc. v. Schultz, 498 F.2d 1146 (4th Cir. 1974)	20, 21
Tasty Baking Co. v. Cost of Living Council, 529 F.2d 1005 (TECA 1975)	16, 18
Terry v. Adams, 345 U.S. 461 (1953)	25
United States v. Causby, 328 U.S. 256 (1946)	25
United States v. Hellard, 322 U.S. 363 (1943)	18
United States v. Oregon, 366 U.S. 643 (1961)	16
United States v. Testan, 424 U.S. 392 (1976)	3, 17
United States ex rel. Moore v. Koelzer, 457 F.2d 892 (3rd Cir. 1972)	20

Statutes and Regulations

	Page
Administrative Procedure Act, Sec. 10	18, 19
Administrative Procedure Act, 5 U.S.C. 701-706	4
Administrative Procedure Act, 5 U.S.C. 702	5
Bankruptcy Act, Sec. 17C (11 U.S.C. §35)	18
Classification Act, 5 U.S.C. 5101 et seq.	17
Economic Stabilization Act of 1970, 12 U.S.C. 1904 note 210 and 211	2, 3, 4, 5, 6, 7, 8, 9
.....10, 12, 13, 14, 15, 16, 17, 18, 19, 23, 24, 27, 28	
Emergency Petroleum Allocation Act, 15 U.S.C. 753(b)	6
Emergency Petroleum Allocation Act, 15 U.S.C. 754	2, 4, 5, 7
Regional Rail Reorganization Act, 45 U.S.C. 701 et seq.	
28 U.S.C. 1254(1)	2
28 U.S.C. 1292(b)	1, 2, 8
Tucker Act	
28 U.S.C. 1346(a)	3
Federal Tort Claims Act	
28 U.S.C. 1346(b)	4
28 U.S.C. 1491	3
28 U.S.C. 2680(a)	4
Code of Federal Regulations, Title 10, Sec. 210.62 (a)	7
Code of Federal Regulations, Title 10, Part 212	6, 8
United States Constitution, Fifth Amendment	4, 5, 6, 9, 10, 14, 17, 20, 21, 24, 25, 26, 27, 28

Page

United States Constitution, Fourteenth Amendment	20, 25
United States Constitution, Fifteenth Amendment ..	25
United States Constitution, Twenty-Sixth Amend- ment	25

Miscellaneous

Dellinger, Of Rights and Remedies: The Constitu- tion as a Sword, 85 Harv. L. Rev. 1532, 1537-52 (1972)	22, 23
Jaffe, "Suits Against Governments and Officers: Sovereign Immunity", 77 Harv. L. Rev. 1, at 21 (1963)	27
Senate Report No. 92-507, 92nd Congress, First Session (1971), U.S. Code Cong. and Admin. News, 2283, 2291	16

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Respondents.

Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States.

Petitioner, McCulloch Gas Processing Corporation ("McCulloch"), prays that a writ of certiorari issue to review that certain order of the Temporary Emergency Court of Appeals of the United States, made and filed on May 9, 1978, upon an interlocutory appeal pursuant to 28 U.S.C. 1292(b), reversing an order of the United States District Court for the Central District of California dated July 12, 1977, denying Summary Judgment to William C. Arntz, Regional Administrator, Federal Energy Administration, Region IX, and the United States of America.

Opinions and Orders Below.

Copies of the orders of the United States District Court for the Central District of California, entered July 12, and October 18, 1977, appear at Appendices "A" and "B" hereto. A copy of the as yet unreported opinion of the Temporary Emergency Court of Appeals of the United States, entered May 9, 1978, appears at Appendix "C" hereto.

Jurisdictional Statement.

Jurisdiction of this matter in the District Court below is founded upon Sections 210 and 211(a) of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. 1904 note Sections 210 and 211, incorporated by reference in the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. 754. The exclusive appellate jurisdiction of the Temporary Emergency Court of Appeals ("TECA") over cases and controversies arising under the ESA and EPAA, including interlocutory appeals, is founded upon Sections 211(b)(1), (b)(2), and (c) of the ESA and 28 U.S.C. 1292(b).

Jurisdiction in this Court is based upon Section 211 (g) of the ESA and 28 U.S.C. 1254(1). The judgment of TECA was entered on May 9, 1978, and this petition for certiorari is filed within 30 days of that date.

Section 211(a) of the ESA affords jurisdiction for the review of regulations and orders issued by the Federal Energy Administration ("FEA") in the District Courts. Section 210(a) authorizes actions for declaratory and injunctive relief, as well as for money damages, for "legal wrongs" arising out of orders or regulations issued by the FEA under the EPAA. That section places no limitation upon those who may be named

as a defendant, nor in cases brought against the United States does the text exclude or limit the remedies available against the Government.

In *Griffin v. United States*, 537 F.2d 1130, at 1134-1136 (TECA), *cert. denied*, 429 U.S. 919 (1976) ("*Griffin*"), TECA concluded that private plaintiffs should have "the right to utilize the jurisdiction afforded in the District Court by Section 211 by bringing the type of action contemplated by Section 210(a) for damages [against the United States], there being no limitation in Section 211 to the contrary." 537 F.2d 1130, at 1136.

In so holding, TECA applied an interpretation to Section 210 which purported to harmonize it with the Tucker Act, 28 U.S.C. 1346(a). The Tucker Act confers jurisdiction in the District Courts over suits for money damages arising from claims under the Constitution or federal statutes, when the amounts of such claims are less than \$10,000. 28 U.S.C. 1346(a). For claims larger in amount, Congress placed jurisdiction in the Court of Claims, 28 U.S.C. 1491, without characterizing that jurisdiction "exclusive".

Section 211, however, provides *exclusive* jurisdiction in District Courts for cases arising under the ESA and EPAA. Thus, in permitting suits in the District Court, "without regard to the amount in controversy," Section 211 substitutes for the Tucker Act and enlarges the jurisdiction of the District Courts.¹

¹It should be noted that there is *no* statute providing an alternative basis for jurisdiction in the District Court whereby review of FEA orders and regulations may be obtained. The remedies of declaratory and injunctive relief are not available under the Tucker Act, 28 U.S.C. 1346(a). *United States v. Testan*, 424 U.S. 392 (1976). Neither is there jurisdiction

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Questions Presented.

1. *Whether Section 210 of the Economic Stabilization Act ("ESA"), 12 U.S.C. 1904 note Section 210, incorporated by reference in Section 5 of the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. 754, grants a right of action against the United States for any remedy, including damages.*

2. *Whether Section 210 of the ESA operates to waive the sovereign immunity of the United States.*

3. *Whether a right of action for damages against the United States may arise from a denial of due process under the Fifth Amendment.*

4. *Whether the due process guarantee of the Fifth Amendment may operate by itself to waive sovereign immunity in an action for damages against the United States.*

5. *Whether Section 210 of the ESA, incorporated in the EPAA, and the due process guarantee of the Fifth Amendment, taken in conjunction, permit the recovery of damages from the United States in an action founded upon the issuance of Federal Energy Administration orders in violation of the EPAA.*

to issue such remedies under the Administrative Procedure Act, 5 U.S.C. 701-706 (*Califano v. Sanders*, U.S., 97 S.Ct. 980, at 984 (1977)), nor the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2680(a). No other section of the ESA or EPAA authorizes judicial action by citizens. The absence of such alternative bases of jurisdiction is relevant to the determination that it was the intent of Congress to establish exclusive jurisdiction in the District Court pursuant to Section 211(a) and that a right of action against the United States for review of FEA orders and regulations as well as for the recovery of damages was created by Section 210.

Federal Constitutional Provision and Statutes Involved.

This petition for certiorari involves the determination of rights arising under the following federal Constitutional provision and statutes, quoted verbatim at Appendix "D" hereto: United States Constitution, Fifth Amendment; 5 U.S.C. 702; 12 U.S.C. 1904 note Sections 210 and 211; and 15 U.S.C. 754.

For the convenience of the Court and because of the centrality to this matter of its construction, Section 210 of the ESA, 12 U.S.C. 1904 note Section 210(a), is also set out herein:

"§210. Suits for damages or other relief

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in Section 211), and/or damages."

Statement of the Case.

1. Claim for Damages Against the United States.

McCulloch Gas Processing Corporation ("McCulloch") commenced this action in the District Court against the Hidrogas defendants² and against William C. Arntz, Regional Administrator in Region IX of the Federal Energy Administration ("FEA") and the

²For purposes of this appeal, the separate identities of defendants Canadian Hidrogas Resources, Ltd.; Hidrogas, Ltd.; Hidrogas, Inc.; and Evan W. G. Bodrug are of no significance and these defendants will be referred to collectively as "Hidrogas."

United States, asserting that it had suffered legal wrong as the result of certain FEA³ orders: (a) compelling it to supply propane to Hidrogas on a credit basis despite that purchaser's failure to pay McCulloch's invoices, poor credit posture and extended history of financial delinquency; and (b) limiting McCulloch's selling price to be charged to this one customer to a level below that authorized by FEA's price regulations, 10 C.F.R. Part 212.

McCulloch seeks, *inter alia*, to recover \$897,184.65, plus interest, for propane delivered to Hidrogas in 1974 and 1975 pursuant to these FEA orders, for which full payment has never been made. The challenged FEA orders compelling these deliveries neither recite nor rest upon substantial nor appropriate evidence; they lack essential findings, are contrary to FEA's regulations and exceed its statutory authority; they are arbitrary and capricious; and, finally, they fail to comport with the purposes and mandate expressed by Congress in Section 4(b)(1) of the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. 753(b), providing for equitable treatment by FEA to suppliers and for protection of the financial viability and competitive abilities of independent marketers, among whom McCulloch is one. Therefore, the challenged FEA orders denied McCulloch due process of law in violation of the Fifth Amendment to the Constitution and McCulloch suffered a "legal wrong", as that term is used in Section 210 of the ESA, 12

³Effective October 1, 1977, the FEA became part of the newly formed Department of Energy ("DOE"). For the convenience of the Court, McCulloch will use the abbreviations DOE and FEA in this petition according to the pertinent time.

U.S.C. 1904 note Section 210, incorporated by reference in the EPAA at 15 U.S.C 754, as amended and extended.

FEA's orders contained no findings of McCulloch's pertinent credit policies (*cf.* 10 C.F.R. 210.62(a)), nor of the nonpayment by Hidrogas of McCulloch's lawful price. McCulloch was instructed that it could not require "cash on delivery" from Hidrogas despite chronic collection difficulties with this Canadian customer. Following issuance of FEA's 1974 orders, Hidrogas promptly commenced purchasing large quantities of propane from McCulloch, and subsequently has failed and refused to pay the agreed-upon contract prices, which are lawful prices, of \$0.17-0.20 per gallon, to McCulloch's total damage of \$897,184.65, plus interest. Hidrogas officers have testified upon depositions that they were advised by FEA *not* to pay McCulloch's prices. McCulloch's losses under FEA's orders mounted rapidly; FEA ignored the matter when it was raised repeatedly by McCulloch.

On January 16, 1975, FEA issued a further order, authorizing McCulloch, for the first time, to require "cash on delivery" from Hidrogas, but simultaneously limiting the price McCulloch could charge to \$0.157 cents per gallon. No evidence was taken by FEA, no hearing or audit was held, no findings were made by FEA, and McCulloch vehemently objected.

FEA is not an agency entitled to set rates for products such as is the Federal Power Commission, now known as the Federal Energy Regulatory Commission. Instead, its regulations permit the charging by a seller of the price of its choice, subject to maximum limits calculated with reference to formulas contained in

FEA's pricing regulations, 10 C.F.R. Part 212. There was, and is, no evidence that \$0.157 was equal to or greater than McCulloch's maximum price limit. In fact, McCulloch informed FEA to the contrary.

Upon McCulloch's administrative appeal, FEA acknowledged in late February 1975 that the pricing portion of its order was invalid and prospectively excused McCulloch from further compliance therewith. FEA neither acknowledged nor sought to remedy the financial injury already suffered by McCulloch as the direct result of its earlier orders. Within two weeks after FEA's February 1975 order, Hidrogas withdrew entirely from buying and selling propane in the United States and declined to purchase any further propane from McCulloch.

Proceedings Below.

In the District Court, the United States moved for summary judgment with respect to McCulloch's claim for money damages against it, asserting the bar of sovereign immunity. Following multiple briefs from each side, the District Court denied the Government's motion on July 12, 1977. The Government moved for reconsideration or, in the alternative, for certification of an interlocutory appeal to TECA, pursuant to 12 U.S.C. 1904 note Section 211(c) and 28 U.S.C. 1292(b). On October 18, 1977, the District Court denied the motion for reconsideration but certified to TECA, and, on December 5, 1977, TECA accepted, the following controlling question of law:

"Whether *Griffin v. United States*, 537 F.2d 1130 (T.E.C.A. 1976), cert. denied 429 U.S. 919 (1976), holds that §210 of the Economic

Stabilization Act, as incorporated by reference in the Emergency Petroleum Allocation Act, provides a right of damages available in suits against the federal government for damages on a basis other than that of an alleged unconstitutional taking of property for a public purpose without just compensation in violation of the Fifth Amendment and whether damages are available against the federal government under that Act in such suits."

In its decision below issued May 9, 1978, TECA declared that notwithstanding its decision in *Griffin v. United States*, supra, Section 210 of the ESA does not afford a right of action for damages against the United States and does not waive sovereign immunity and that, *Griffin* aside, damages are not available in suits against the United States for a denial of due process by FEA.

Relying upon this Court's decision in *The Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), TECA acknowledged that the ESA and EPAA would violate the Fifth Amendment unless a right to compensation for the taking of property for public benefit were available under the statutes. Noting that exclusive jurisdiction in cases under these acts was conferred upon the District Courts and not the Court of Claims, TECA concluded that it had permissibly departed from the statutory scheme in *Griffin* to imply a right to damages for a taking of property, but that it would not depart from the statutory scheme to imply a right to damages under Section 210 and the Fifth Amendment for violation of the equally fundamental right to due process of law. TECA asserted that rights of action against the United States under the statutes

could be based only upon Section 211 of the ESA and then for injunctive and declaratory relief alone.

This reasoning evoked a rare concurring opinion in which Judge Christensen admonished TECA for undermining the logic of its earlier decision in *Griffin*, which construed Section 210 as affording a right of action for damages against the United States where necessary under the just compensation clause of the Fifth Amendment and which treated Section 211 as merely stating conditions and limits upon the remedies of declaratory judgment and injunction available against the United States under Section 210. Both opinions below err, we contend, in finding no waiver of sovereign immunity in Sections 210 and 211 nor in the due process clause of the Fifth Amendment.

REASONS FOR GRANTING THE WRIT.

1. **TECA's Decision Below Conflicts With This Court's Decision in *Regional Rail*, With TECA's Own Decision in *Griffin* and With the Decisions of Several Courts of Appeals Construing Similar Statutory Language.**

In the *Regional Rail Reorganization Act Cases* (*Blanchette v. Connecticut General Insurance Corp.*) (*"Regional Rail"*), 419 U.S. 102 (1974), creditors and shareholders of the bankrupt Penn Central Railroad contended that the Regional Rail Reorganization Act (*"Rail Act"*) violated the just compensation clause of the Fifth Amendment in several respects: Providing inadequate and unfair compensation for the assets to be absorbed by the United States into the Consolidated Rail Corporation (*"Conrail"*) and by requiring the railroad to operate at a loss for an indefinite period of time prior to compensation. The majority opinion expressed "grave doubts whether the Rail Act would be constitutional if a Tucker Act remedy were not available as compensation for any unconstitutional [taking] not compensated under the Act itself", 419 U.S. at 135, for the shareholders would have been left "without adequate assurance that compensation will ever be provided," and the entire reorganization plan would have been unconstitutional since "at the time of taking 'reasonable, certain and adequate provision for obtaining compensation' must be provided. 419 U.S. at 124-125, quoting *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, at 659 (1890).

This Court found there was sufficient legislative history to support the view that Congress had never intended in the Rail Act affirmatively to withdraw

the Tucker Act remedy; instead that remedy lay behind and in addition to the compensation provided in the Rail Act itself. Against the contention that exclusive jurisdiction of all Rail Act claims in a Special Court other than the Court of Claims effectively withdrew the Tucker Act remedy, this Court noted the special tribunal existed to allocate huge sums to damage claimants and that Congress may have been convinced the financial authority available to the Special Court "would surely equal or exceed the required constitutional minimum." 419 U.S. at 128, 129. This Court found the language of the Rail Act was clearly susceptible of the interpretation and should be interpreted as permitting and not withdrawing appropriate Tucker Act remedies.

In *Griffin v. United States*, 537 F.2d 1130 (TECA), cert. denied, 429 U.S. 919 (1976) ("*Griffin*"), TECA addressed a similar problem with respect to Sections 210 and 211 of the ESA, incorporated in the EPAA, the statutes at issue herein. In *Griffin*, plaintiffs sought damages from the United States for an alleged taking of their property as the result of the operation of FEA's crude oil pricing regulations adopted under the EPAA.

Section 211(a) provides for exclusive jurisdiction over all cases arising under the EPAA in the District Courts. TECA found no basis for an action in the Court of Claims under the Tucker Act. No compensation fund was available to the District Court as was provided under *Regional Rail* to the Special Court. No legislative history existed to indicate the availability of the Tucker Act. The evidence of an affirmative withdrawal of the Tucker Act remedy being stronger,

and the risk of unconstitutionality being consequently greater, TECA, relying upon *Regional Rail*, inferred that the intent of Congress in the ESA was to afford jurisdiction under Section 211 over all claims arising under the EPAA and to authorize an action for damages under Section 210(a) against the United States for "legal wrongs" arising out of orders or regulations under EPAA. 537 F.2d at 1135. This construction of Section 210 was clearly permitted by the language of that section, which allows "any person suffering legal wrong" resulting from FEA orders to bring an action in the District Court "for appropriate relief, including . . . damages."

Rejecting an argument by the Government that Section 210 was limited to "private suits" to which the United States was not a party, TECA observed:

"The fact that 'private suits' such as those brought by plaintiffs name as defendant, and seek monetary damages against, the United States no more renders them public suits than are claims brought by private individuals to recover damages against the United States, for example, under the Tort Claims Act. The characterization of such suits as something other than private suits contemplated by Section 210(a) even though it is assumed they involve legal wrong arising under EPAA, and precluding any action against the government pursuant to the latter section seems difficult to justify.

We believe that if or to the extent plaintiffs suffered legal wrong because of any taking of their property as a result of the two-tier oil pricing system, they would have the right to utilize the

jurisdiction afforded in the District Court by Section 211 by bringing the type of action contemplated by Section 210(a) [against the United States] for damages, there being no limitations in Section 211 to the contrary." 537 F.2d at 1136 (footnotes omitted).

McCulloch's action for damages against the United States rests upon the above-quoted language in *Griffin*: McCulloch's predicate is that Section 210 is as hospitable to claims for damages resulting from a denial of due process by FEA as to claims of "taking" of property.

Notwithstanding its decision in *Griffin*, TECA held in the present case that Section 210 does not afford a right of action for damages against the United States; further, it asserts there can be no action against the United States for relief of any sort under Section 210. (Appendix "C" at pp. 15-16). TECA now asserts it relied upon *Regional Rail* in *Griffin* for the implication of a remedy required by the Fifth Amendment and not available in any language enacted by Congress.

This latest construction by TECA turns *Regional Rail* upon its head. There, this Court addressed the text of the Rail Act, saw that it sheltered ample compensation remedies and that its language and history could comfortably be understood and interpreted not as withdrawing Tucker Act remedies but instead as providing an additional remedy for plaintiffs to be exhausted before resort was had to the Tucker Act. Here, TECA concedes that no Tucker Act remedy is available under the ESA and EPAA, and no separate fund has been specially provided.

Cutting from whole cloth and without regard for its recent words in *Griffin*, TECA declares all references to "damages" in Section 210 are not applicable to the United States. TECA asserts that Section 211 limits the ESA's remedies against the United States to declaratory judgments and injunctions; TECA fails to follow the text of Section 211 which only places restrictions on the terms of these remedies when invoked against the Government. Section 211 neither establishes these remedies nor precludes a damage remedy against the United States. Finally, TECA creates an implied Fifth Amendment remedy in an effort to save the statute in has retailored from unconstitutionality.

Regional Rail, although cited by TECA as authority for its decision, does not allow wholesale rewriting of statutes but rather interpretation grounded in language and history approved by Congress. All the sections of an enactment are to be harmonized where possible, not disregarded where convenient.

Section 210 of the ESA draws no distinction on its face between actions against the government for damages resulting from a "taking" and damages resulting from a violation of the due process clause. Section 210 provides that a person suffering "legal wrong" because of any order or regulation issued under the EPAA may bring an action in the District Courts for a declaratory judgment, writ of injunction, or *damages*. The United States, being the only entity authorized under the EPAA to issue an order or regulation pursuant thereto must necessarily have been contemplated as the logical defendant in an action brought pursuant to Section 210, including an action for damages, there being no language contained in Section 210 to the

contrary.⁴ Prior decisions of TECA cite Section 210 as their basis for the declaratory and injunctive remedies against the United States. See *Atlantic Richfield Co. v. FEA*, 556 F.2d 542, at 544 (TECA 1977); and *Tasty Baking Co. v. Cost of Living Council*, 529 F.2d 1005, at 1010 (TECA 1975).

Not only did TECA decline in this case to find a right of action in Section 210(a) against the United States, it went on to rule that Section 210 provides no waiver of sovereign immunity even for a right of action based elsewhere (App. "C" at 13). Yet in *Griffin*, no immunity was seen in Section 210:

"We believe . . . [plaintiffs] would have the right to utilize the jurisdiction afforded in the

⁴TECA purports to justify its interpretation of Section 210 by reference to a brief excerpt in the Senate Report preceding its adoption:

"Section 210 provides a traditional method by which violators of regulations may be discovered and other would-be violators may be deterred. This can be accomplished by authorizing a person suffering a legal wrong to bring a treble damage action against the violator.

This action is intended to be brought by private persons against other private persons. The government will not bring such action nor be the subject of one. . . ." S. Rep. No. 92-507 92nd Congress, First Session, (1971), U.S. Code Cong. and Admin. News, 2283, 2291.

TECA's reliance upon this brief reference to Section 210 is misplaced for two reasons. First, as TECA found in *Griffin*, the statement refers to Section 210(b)(1) which provides for treble damage actions for overcharges in the sale of goods or services by parties regulated under the ESA. Section 210(b) provides an additional remedy intended to supplement the general provision of a right of action under Section 210(a), which, when read in context, provides for a much more comprehensive right of action than the treble damage provisions of Section 210(b)(1). Further, it is an established rule of statutory construction that legislative history may not be used to change the meaning of a clear and unambiguous statute. *United States v. Oregon*, 366 U.S. 643 (1961); *Gemsco, Inc. v. Walling*, 324 U.S. 244, at 260 (1945).

district court by §211 by bringing the type of action contemplated by §210(a) for damages, there being no limitation in §211 to the contrary." 537 F.2d at 1137.

The willingness of TECA to imply new meaning in Sections 210 and 211 in the present case, justified ostensibly by *Regional Rail*, is cut off abruptly when TECA reaches the waiver of sovereign immunity in Section 210 and turns to *United States v. Testan*, 424 U.S. 392 (1976) for support. TECA now states that the right of action for damages it found in *Griffin* to remedy constitutional violations is illusory, for Section 210 does not waive sovereign immunity. A waiver sufficient to support the conclusion in *Griffin* arises instead from the self-executing just compensation clause of the Fifth Amendment. TECA's interpretation reads too much into *Testan* and too little into Section 210.

Testan provides only that a party's "asserted entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the federal government for the damage sustained.'" 424 U.S. 392, at 400, 96 S.Ct. 948, at 954.⁵

The fact that the United States is not expressly named in Section 210 is not essential to the interpretation of that section; a waiver of sovereign immunity may be found even in the absence of these words.

⁵*Testan* rejected a plaintiff's attempts to find an implied waiver of sovereign immunity in the Classification Act, 5 U.S.C. §1501 et seq. The Classification Act for federal employees, unlike Section 210, contained no provision for a damage action by employees adversely affected. Remedies were restricted to administrative reconsideration. Of course, *Testan* also involved only a claim for damages based upon a statutory entitlement, rather than the constitutional right to due process involved here.

Such a waiver has been found several times with respect to similar provisions in other statutes which do not exclude actions against the government and which also do not expressly refer to such actions.⁸

In *Schlafly v. Volpe*, 495 F.2d 273 (7th Cir. 1974), the Court construed Section 10 of the Administrative Procedure Act, which begins:

"[A] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within a meaning of a relevant statute, is entitled to judicial review thereof."

The *Schafly* Court held this language of Section 10 constituted a consent by the government to be sued. 495 F.2d 273, at 282. Construing the same language, the District of Columbia Circuit in *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, at 874 (D.C. Cir. 1970) also found a waiver of sovereign immunity and commented:

"It seems axiomatic to us that one must imply, from a statement by the Congress that judicial review of agency action will be granted, an intention on the part of Congress to waive the right

⁸*McKenzie v. United States*, 536 F.2d 726 (7th Cir. 1976) (finding a waiver of sovereign immunity under Section 17C of the Bankruptcy Act, 11 U.S.C. §35); *United States v. Hellard*, 322 U.S. 363, 64 S.Ct. 985 (1943) (waiver of sovereign immunity found to be implied by a jurisdictional statute providing for partition proceedings of certain Indian lands). See also TECA's reference to Section 210 in granting declaratory and injunctive relief in *Atlantic Richfield Co. v. FEA*, 556 F.2d 542, at 544 (TECA 1977); and *Tasty Baking Co. v. Cost of Living Council*, 529 F.2d 1005, at 1010 (TECA 1975).

of sovereign immunity; any other construction would make the review provisions illusory."⁷

The similarity of Section 210 in grammatical structure to Section 10 of the Administrative Procedure Act is yet a further assurance that the same conclusion, recognition of a waiver of sovereign immunity, should be applied to Section 210. Unlike the Administrative Procedure Act, Section 210 goes on to afford the remedy of damages as well as declaratory and injunctive relief. Therefore, although one may not sue the United States for damages under the Administrative Procedure Act, the conclusion by the Court below that damages are not available against the United States under Section 210 is in conflict with the interpretation given by other circuits to similar statutory language.

Since TECA is vested with exclusive jurisdiction over Section 210 and 211 of the ESA, the possibility of direct conflicts between TECA and other circuits is eliminated. Thus, two principal indicia of the need for review of an issue by this Court, must be: (a) Conflicts between TECA decisions on the same statutory subject, and (b) conflicts between TECA and other Courts of Appeals construing similar statutory language arise.

⁷*Accord, International Engr. Co., Div. of A-T-O, Inc. v. Richardson*, 512 F.2d 573, at 577 (D.C.Cir. 1975), cert. denied, 423 U.S. 1048 (1976); *Eastern Kentucky Welfare Rights Org. v. Simon*, 506 F.2d 1278, at 1283 (D.C.Cir. 1974), rev'd on other grounds, 426 U.S. 26 (1976); *Kingsbrook Jewish Medical Center v. Richardson*, 486 F.2d 653, at 658 (2nd Cir. 1973); *Kletschka v. Driver*, 411 F.2d 436, at 445 (2nd Cir. 1969); *Brennan v. Udall*, 399 F.2d 803, at 805 (10th Cir. 1967).

2. **TECA's Decision Below Conflicts With the Decisions of Several Courts of Appeals as to the Availability of an Action for Damages Against the United States Occasioned by a Denial of Due Process of Law.**

TECA's decision in this case that no right of action for damages is available to remedy a denial of due process is in conflict with the decisions of a number of other Courts of Appeals which have applied to the Fifth Amendment the rationale of this Court's decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, ("Bivens") (403 U.S. 388 (1971)).⁸

In *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1977), *certiorari* granted June 5, 1978, *sub nom. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, No. 77-1327, the Ninth Circuit apprehended a damage action for a Fifth Amendment due process violation arising directly from the Constitution:

"The Court in *Bivens* fashioned a cause of action against federal officers for a violation of the Fourth Amendment. The Court found a damages remedy implied in the Constitution, viewing it as an unsurprising remedy solidly rooted in

⁸See, e.g., *Gentile v. Wallen*, 562 F.2d 193, 196 (2nd Cir. 1977) (14th Amendment); *United States ex rel. Moore v. Koelzer*, 457 F.2d 892, 894 (3rd Cir. 1972) (5th Amendment); but see *Mahoney v. Waddle*, 564 F.2d 1018 (3rd Cir. 1977) (declining to allow cause of action on 14th Amendment alone); *States Marine Lines, Inc. v. Schultz*, 498 F.2d 1146, 1156-57 (4th Cir. 1974) Fifth Amendment); *Fitzgerald v. Porter Memorial Hospital*, 523 F.2d 716, 718-19 and note 7 (7th Cir. 1975) (14th Amendment); *contra*, *Kostka v. Hogg*, 560 F.2d 37, 44 (1st Cir. 1977), *contra*, *Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978).

history. 403 U.S. at 395-96, 91 S.Ct., at 2004 quoting from *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 90 L. Ed. 939 (1946):

'[I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.'

"Since appellant's claim is based on the Fifth, rather than the Fourth, Amendment, we must determine whether the rationale of *Bivens* can be extended to Fifth Amendment claims.

"Although the question whether to limit the applicability of *Bivens* to the Fourth Amendment has apparently not been decided by this circuit (footnote omitted), most courts of appeals have held that the remedy is not so limited.

"We believe that this is the better view. The due process rights protected by the Fifth Amendment are as fundamental as those protected by the Fourth Amendment. Nothing in *Bivens* warrants limitation to Fourth Amendment claims; its rationale clearly supports extension to cases of this sort." 566 F.2d 1353, at 1363-1364.

In *States Marine Lines, Inc. v. Schultz*, 498 F.2d 1146 (4th Cir. 1974), a damage remedy was found to be a necessary and appropriate form of relief for a deprivation of property without due process of law by Customs agents who boarded the plaintiff's vessel and seized his cargo. The plaintiff alleged that there was a violation of the Fifth Amendment actionable under *Bivens*:

"The necessity and appropriateness of judicial relief is no less compelling in this case than it was in *Bivens*. As in *Bivens*: a common law or state tort remedy may or may not afford a means of redressing this wrong, but in any case, will not be tailored specifically to cases of lawlessness pursuant to federal authorities; the claim presented is obviously appropriate for money damages; and other remedies such as injunctive or relief in the nature of *mandamus* are no longer viable alternatives." 498 F.2d at 1157.

A private right of action was implied to complement the Securities Exchange Act of 1934 in *J. I. Case v. Borak* ("*J. I. Case*"), 377 U.S. 426 (1964); this Court there viewed a damage remedy as "necessary" to effectuate statutory purposes and as complementary of other remedies. 377 U.S., at 433. In this regard, this Court has been sensitive to extending the availability of remedies for constitutional violations. As stated by Mr. Justice Black in *Bell v. Hood*, 327 U.S. 678 (1946): "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." (*Id.* at 684.) The predicate to an implication of remedies is the ineffectuality of alternate forms of redress for the plaintiff at bar. One commentator has remarked:

"The focus should then be upon whether there are other remedies available to those in the plaintiff's position that would as fully effectuate the purposes of the constitutional guarantee as the remedy sought; as in [*J. I. Case*] the fact that persons in other situations may have access to remedies that will vindicate their rights under the

constitutional provision in question should not preclude the judicial creation of remedies for a particular plaintiff who is without effective means of redress." Dellinger, "Of Rights and Remedies: The Constitution as a Sword", 85 *Harv.L.Rev.* 1532, 1551 (1972).

TECA asserts in the opinion below that McCulloch's sole redress for a denial of due process that caused it financial loss resides in Section 211 and is limited to declaratory or injunctive relief enjoining the prospective enforcement of a regulation or order. (Appendix "C" at 15.) While actions for equitable relief may vindicate the rights of "other persons in other situations", they fail to provide to McCulloch any "effective means of redress" for the financial injury it suffered by reason of the FEA Orders issued to it.

McCulloch seeks damages from the United States here because the alternative remedies of declaratory relief or injunctive relief are ineffectual in this case. Approximately one month after FEA's final order was issued in 1975, it was rescinded on appeal and Hidrogas withdrew from the United States market into Canada. The damage accrued during the pendency of FEA's order, while judicial review was premature and agency proceedings were continuing. Monetary compensation is McCulloch's only effective remedy.

TECA in its decision below stated that it did not dispute that McCulloch's right to procedural due process is as basic and as deserving of protection as its right to be compensated for a taking of its property for a public use. (Appendix "C" at 13.) Having acknowledged such a substantive right, TECA's determination that no damage remedy was available appears difficult

to justify. Two equally basic, equally substantive Fifth Amendment rights have been recognized by TECA, but a right of action for damages is not available for the invasion of one.

A procedural vehicle by which one may pursue Fifth Amendment just compensation remedies is the Tucker Act, even though the right of action derives from the Constitution. Section 210 of ESA performs an identical office for the Fifth Amendment due process guarantee. Section 210 makes express reference to damages and has been cited by TECA in *Griffin* as applicable to the United States. The implication that this damage remedy is available to correct a denial of due process is a smaller and easier step than in *J. I. Case*, though one refused by TECA, without explanation. (See Appendix "C" at pp. 15-16.)

It precisely accords with *Bivens* and *J. I. Case* for this Court to permit McCulloch's right of action for damages against the United States herein. It remains for the District Court, at trial, to determine whether McCulloch establishes facts sufficient to prove a denial of due process. For purposes of this interlocutory appellate proceedings, it should be assumed a due process violation occurred; at issue is the remedy for it.

TECA also ruled in the present case that Section 210 does not waive sovereign immunity, a conclusion at apparent odds with its holding in *Griffin*, 537 F.2d at 1137. TECA has now apparently revised its decision in *Griffin* and premised the waiver of sovereign immunity necessary in "taking" cases like *Griffin* upon the purportedly self-executing and "implicit" waiver of immunity in the Fifth Amendment's just compensation clause. (Appendix "C" at p. 13.) It is unquestionably

true that the just compensation clause has been described by this Court on different occasions as being "self-executing". *United States v. Causby*, 328 U.S. 256 (1946); *Jacobs v. United States*, 290 U.S. 13 (1933). However, TECA went on to conclude that the due process clause is *not* self-executing. Just what it is about the just compensation clause of the Fifth Amendment that renders it "self-executing" and that distinguishes it from the due process clause has not been explained.

In addition to the just compensation clause of the Fifth Amendment, other provisions of the Constitution's amendments have been declared self-executing, among them the Fifteenth and Twenty-Sixth Amendments. See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (Fifteenth Amendment); *National Association for the Advancement of Colored People v. New York*, 413 U.S. 345 (1973) (Fifteenth Amendment); *Terry v. Adams*, 345 U.S. 461 (1953) (Fifteenth Amendment); *Cheyenne River Sioux Tribe v. Andrus* (8th Cir. 1977) 566 F.2d 1085 (Twenty-Sixth Amendment). Nothing linguistically distinguishes these Amendments from the due process clause of the Fifth Amendment or identifies their "self-executing" character.

Indeed, the due process clauses of the Fifth Amendment and of the Fourteenth Amendment have been characterized in dicta, as "self-executing"; in one instance a three-judge district court, including a member of the TECA panel in the present case, stated:

"Here we are sought to utilize and implement the self-executing due process clause to destroy the governmental sex discriminatory practice sponsored by the two statutes." *Ballard v. Laird*,

6 CCH Employment Practices Decisions ¶8793 at 5404 (S.D. Cal. 1973).

The Court granted the plaintiff, Ballard, equitable relief and damages. See also the concurring opinion of Mr. Justice Harlan, joined in by Mr. Justice Stewart, in *Monroe v. Pape*, 365 U.S. 167, at 198 (1961).

That there was no legislative mandate for the remedy afforded in the *Ballard* case is clear. Rather, the District Court fashioned the requisite redress for the government's invasion of a constitutionally protected substantive right of due process guaranteed by the Fifth Amendment.

This result is sound, for to hold otherwise would mean that one is entitled to due process only when Congress affirmatively legislates that due process should be available. Such a construction could eviscerate the due process clause.

In the present case, no remedy except damages is effectual. It is an insufficient response after *Bell v. Hood*, *supra*, and *Bivens*, *supra*, to cease judicial inquiry, as TECA did here, after labeling the due process clause as not self-executing and therefore failing of a waiver of sovereign immunity. For on the issue of sovereign immunity, "[t]he decision whether a claim is consented or unconsented is frequently a matter of legal hair splitting courts would be ashamed of in any other context." *Atkins v. United States*, 556 F.2d 1028, at 1072 (Ct. Cl. 1977) (concurring opinion of Judge Nichols).

This Court's decision this week in *Monell v. Department of Social Services of the City of New York*, U.S. (June 6, 1978) courageously confined the sphere of sovereign immunity and authorized damage actions against municipalities for administrative denials of due process of law, overturning *Monroe v. Pape*, 365 U.S. 167 (1961). This Court found there is a basis in the language and history of the Civil Rights Act of 1871 for this withdrawal of sovereign immunity. Suits against the United States do not raise the same problems of federalism as in *Monell*, but, historically, decisions regarding the scope of sovereign immunity of the states and state officers have followed a roughly parallel course with those defining the scope of sovereign immunity for federal entities and employees. Jaffe, "Suits Against Governments and Officers: Sovereign Immunity", 77 *Harv. L. Rev.* 1, at 21 (1963).

In the present case, we submit, Section 210 affords a basis for this Court to determine that Congress authorized a waiver of immunity for suits under the ESA and EPAA. In this case, a waiver serves to vindicate the protection of Fifth Amendment rights, precisely as in *Monell*.

If we have mistaken the Congressional purpose for Section 210, it is still appropriate to interpret that Section as the procedural vehicle expressing the self-executing waiver of sovereign immunity which should inhere in the Fifth Amendment's due process clause, following this Court's reasoning in *Regional Rail*, *supra*,

that statutory constructions will be favored which support the effectuation of Constitutional guaranties.

Where no other remedy but damages will avail to vindicate a particular invasion of the core of a petitioner's Fifth Amendment due process right, the remedy of damages should be made effective. In the present case, FEA orders were issued without notice, hearing, substantial evidence and in excess of the statutory powers of the agency. Whatever the possible penumbras of the Fifth Amendment, it is that provision's very center at issue in this case, and the due process clause should be held here to be "self-executing".

The liberality of construction urged in *Regional Rail, supra*, to save a statute from unconstitutional operation—a liberality relied upon by TECA here and in *Griffin*—is at odds with TECA's unwillingness to acknowledge that the same broad language of Section 210 which it has held will permit damages against the United States in a "taking" context should also operate to waive sovereign immunity in this due process setting, both directly and to effectuate the appropriately self-executing character of the Fifth Amendment where non-damage remedies are insufficient. Further, TECA's determination to avoid a damages remedy conflicts with the adjustment of remedies called for in *Bell v. Hood supra*, *Bevins, supra*, and *Monell, supra*, for which reasons certiorari should be granted.

3. This Case Presents to This Court a Rare Opportunity to Review Novel Issues of Major and Continuing Importance in the Administration of the Nation's Energy Controls and to Exercise Supervision Over TECA.

This Court has not accepted for review any decision by TECA since the inception of federal energy price controls in 1973. Because of its exclusive appellate jurisdiction over all cases arising under the ESA and EPAA, TECA is not subject to supervision except by this Court. Its opinions rarely collide with those of other Courts of Appeals.

The importance of federal energy policy and regulations in the national economy is so great as to require no elaboration. Their impact intrudes into every business and home in America. The effectiveness of judicial control over the due process afforded by the energy bureaucracy is directly a function of the remedies available to citizens aggrieved by the denials of due process. This case presents precisely whether damages are available under these unique statutes, ESA and EPAA, to remedy a governmentally-sponsored, caused or aggravated legal wrong.

Both the novelty and significance of the issues herein presented are underscored by the confusion in reasoning and conflicts in results between TECA's ruling in the present case and in *Griffin*. The District Court, following *Griffin*, held that damages should be available in the present case, that the issue is controlling with respect to further trial proceedings and its conclusion,

compared with that of TECA demonstrates the legitimacy of differences of opinion on this important question, itself a consideration for certiorari. *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390, at 393 (1968); *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, at 20 (1960).

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the order of the Temporary Emergency Court of Appeals entered May 9, 1978.

Respectfully submitted,

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June 8, 1978.

APPENDIX "A."

Order.

United States District Court, Central District of California.

McCulloch Gas Processing Corporation, a Delaware corporation, Plaintiff, v. Canadian Hidrogas Resources, Ltd., a Canadian corporation; Hidrogas, Ltd., a Canadian corporation; Hidrogas, Inc., a Montana corporation; Evan W.G. Bodrug, President of Canadian Hidrogas Resources Ltd., Hidrogas, Ltd. and Hidrogas, Inc.; William C. Arntz, Regional Administrator, Federal Energy Administration, Region IX, inclusive, Defendants. Civil Action No. CV75 576EC.

On June 7, 1977 the Motion for Summary Judgment of the Federal Defendants came on regularly for hearing before the Court; the Federal Defendants appearing through its counsel Christopher M. Was, Esq., Department of Justice, and Barry J. Trilling, Esq., Assistant U.S. Attorney, Defendants CANADIAN HIDROGAS RESOURCES, LTD., HIDROGAS, LTD, HIDROGAS INC., AND EVAN W. G. BODRUG ("the nongovernmental defendants") appearing by Frank R. Ubhaus, Esq., and Plaintiff McCULLOCH GAS PROCESSING CORPORATION ("Plaintiff") appearing by Franklin D. Dodge, Esq., and the Court having considered the respective parties' papers filed herein and oral arguments of counsel, and the Court having ordered further memoranda of points and authorities on the issues of the propriety of Plaintiff's claim for money damages against the federal government and the necessity of the certification of a potential constitutional issue to the Temporary Emergency Court of Appeals ("TECA"), and having considered the respective parties' papers filed on said

issues, and finding no necessity for a certification to the TECA, and good cause appearing therefor,

IT IS HEREBY ORDERED that the Federal Defendants' Motion Summary Judgment on Plaintiff's claim for money damages against the federal government be, and hereby is, denied, now that the government has been made a party [EAC].

IT IS FURTHER ORDERED that Plaintiff be granted leave to file and serve its Third Amended Complaint upon the aforementioned non-governmental and Federal defendants; and

IT IS FURTHER ORDERED that Plaintiff join the UNITED STATES OF AMERICA as a party defendant to this action and serve said defendant forthwith.

Dated: July 12, 1977.

/s/ E. Avery Crary

Judge of the United States District
Court, Central District of California

APPENDIX "B."

Order.

United States District Court, Central District of California.

McCulloch Gas Processing Corporation, a Delaware corporation, Plaintiff, v. Canadian Hidrogas Resources, Ltd., a Canadian corporation; Hidrogas, Ltd., a Canadian corporation; Hidrogas, Inc., a Montana corporation; Evan W.G. Bodrog, President of Canadian Hidrogas Resources Ltd., Hidrogas, Ltd. and Hidrogas, Inc.; William C. Arntz, Regional Administrator, Federal Energy Administration, Region IX, and the United States of America; inclusive, Defendants. Civil Action No. CV 75 576 EC.

The federal defendants' Motion for Interlocutory Appeal pursuant to 28 U.S.C. 1292(b), having come on regularly for hearing on October 11, 1977, and the Court having considered the Memoranda submitted by counsel as well as oral argument,

It is hereby ORDERED that the Court's July 12, 1977 Order denying the federal defendants' Motion for Summary Judgment on plaintiff's claim for money damages against the federal government is amended by the addition of the following paragraph:

"The Court, being of the opinion that its ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, pursuant to 28 U.S.C. 1292(b) certifies the following issue for interlocutory appeal to the Temporary Emergency Court of Appeals:

Whether *Griffin v. United States*, 537 F.2d 1130 (TECA 1976), *cert. denied*, holds that §210 of the Economic Stabilization Act, as incorporated by reference in the Emergency Petroleum Allocation Act, provides a right of damages available in suits against the federal government for damages on a basis other than that of an alleged unconstitutional taking of property for a public purpose without just compensation in violation of the Fifth Amendment and whether damages are available against the Federal Government under that Act in such suits."

DATED: Oct. 18, 1977.

E. AVERY CRARY
UNITED STATES DISTRICT JUDGE

APPENDIX "C."

Opinion of the Temporary Emergency Court of Appeals of the United States.

Temporary Emergency Court of Appeals of the United States.

McCulloch Gas Processing Corporation, Plaintiff-Appellee, v. Canadian Hidrogas Resources, Ltd., a Canadian corporation; Hidrogas, Ltd., a Canadian corporation; Hidrogas, Inc., a Montana corporation; Evan W. G. Bodrug, President of Canadian Hidrogas Resources Ltd., Hidrogas, Ltd. and Hidrogas, Inc., Defendants-Appellants, and William C. Arntz, Regional Administrator, Federal Energy Administration, Region IX, and the United States of America, Federal Defendants-Appellants. No. 9-39.

On Appeal from the United States District Court for the Central District of California (No. Civ. 75-576-EC).

(Argued February 27, 1978, Decided May 9, 1978)
STEPHANIE LACHMAN GOLDEN, Department of Justice, Washington, D.C., with whom Barbara Allen Babcock, Asst. Attorney General and Dennis G. Linder, were on the brief for Defendants-Appellants. RICHARD T. WILLIAMS, Kadison, Pfaelzer, Woodward, Quinn & Rossi, Los Angeles, California, with whom Thomas J. McDermott, Jr. of the same firm, was on the brief for Plaintiff-Appellee.

FRANKLIN D. DODGE, McCulloch Gas Processing Corporation, Los Angeles, California, with whom Don G. Kircher and Charles R. Kocher, were on the brief for Plaintiff-Appellee.

Before CARTER, CHRISTENSEN and ZIRPOLI, Judges.

PER CURIAM.

Plaintiff-appellee, McCulloch Gas Processing Corporation, brought this action against Hidrogas¹ and, more significantly for purposes of this appeal, William C. Arntz, Regional Administrator of the Federal Energy Administration, Region IX, and the United States. McCulloch claims that it suffered a legal wrong as a result of certain FEA² orders requiring it to continue supplying Hidrogas with propane despite that purchaser's poor credit posture and history of financial delinquency. McCulloch seeks to recover \$897,184.65, plus interest, for propane delivered to Hidrogas in 1974 and 1975. The FEA orders are characterized by plaintiff as having been issued in a manner that denied McCulloch due process of law. Although the parties to the instant appeal³ disagree as to the proper portrayal of the facts of this dispute, the question presented to this court for decision does not require us to resolve this issue.

The federal defendants moved for summary judgment in the district court, where they argued, *inter alia*, that plaintiff's suit for damages against the United States was barred by the doctrine of sovereign immunity. The district court denied the government's motion, but

¹For purposes of this appeal, the separate identities of defendants Canadian Hidrogas Resources, Ltd.; Hidrogas, Ltd.; Hidrogas, Inc.; and Evan W. G. Bodrug are of no significance, and they will be referred to collectively as Hidrogas.

²As of October 1, 1977, pursuant to the Department of Energy Organization Act (P.L. 95-91), and Executive Order 12009 (42 Fed. Reg. 46267, Sept. 15, 1977), the FEA became part of the newly-established Department of Energy. Since the orders at issue in this appeal were issued by the FEA, this opinion will refer to the FEA, although the proper reference is now the DOE.

³Hidrogas is not a party to this appeal.

it certified to this court, pursuant to 28 U.S.C. section 1292(b), the following question:

Whether *Griffin v. United States*, 537 F.2d 1130 (TECA 1976), *cert. denied*, [429 U.S. 919] holds that § 210 of the Economic Stabilization Act, as incorporated by reference in the Emergency Petroleum Allocation Act, provides a right of damages available in suits against the federal government for damages on a basis other than that of an alleged unconstitutional taking of property for a public purpose without just compensation in violation of the Fifth Amendment and whether damages are available against the federal government under that Act in such suits.

We find that *Griffin* does not control the outcome of this appeal and that the United States has not exposed itself to damage claims like those brought by McCulloch.

Plaintiffs in *Griffin* sought damages against the United States for an alleged taking of their property for a public purpose without just compensation. Specifically, plaintiffs complained of the operation of the two-tier pricing system on domestic crude oil, by virtue of which a ceiling price of \$5.25 per barrel was imposed on "old" oil while new and released oil could be sold without regard to the ceiling price.⁴ Before reaching the merits of plaintiffs' claims, the court addressed certain preliminary jurisdictional questions. The government in *Griffin*, as it does here, contended that section

⁴For a more complete picture of the two-tier crude oil pricing system, see *Griffin* and cases cited therein, 537 F.2d at 1131 n.1.

210⁵ could not provide the foundation for an action against the government, that its sole function was the creation of a private cause of action, by which one private party could sue another private party for the latter's violation of the Act, or regulations and orders issued thereunder. Insofar as a private party sought relief against the government, it was argued that the only available remedy was the declaratory and injunc-

⁵§ 210. Suits for damages or other relief

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

(2) not less than \$100 or more than \$1,000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: *Provided*, That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

(c) For the purposes of this section, the term "overcharge" means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

tive relief provided in section 211⁶ of the Economic Stabilization Act.

Had the government's position prevailed in *Griffin* the victory would have been short-lived. It is unlikely

⁶§ 211. Judicial Review

(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders, issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

(b) (1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals. . . . Except as provided in subsection (d)(2) of this section, the court shall not have power to issue any interlocutory decree staying or restraining in whole or in part any provision of this title or the effectiveness of any regulation or order issued thereunder. In all other respects, the court shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title.

(d)(2) A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it. . . .

(e)(1) Except as provided in subsection (d) of this section, no interlocutory or permanent injunction restraining the enforcement, operation, or execution of this title, or any regulation or order issued thereunder shall be granted by any district court of the United States or judge thereof. Any such court shall have jurisdiction to declare (A) that a regulation of an agency exercising authority under

(This footnote is continued on next page)

that the defendant would thereby have avoided the immediate threats of a substantial claim for damages,⁷ and the constitutionality of the Act would have been put in serious question, for the Fifth Amendment prohibits the result urged by the government in *Griffin*.

Absent the provision in section 211(a) investing the district courts with exclusive jurisdiction over cases arising under the EPAA, plaintiffs in *Griffin* could have brought their action under the Tucker Act,⁸ for that Act would ordinarily provide the jurisdictional basis for a suit alleging an unlawful taking. The government argued, however, that, having withdrawn the Tucker Act remedy, the EPAA left plaintiffs with no damage remedy at all, only the declaratory and injunctive relief provided in section 211.

this title is in excess of the agency's authority, is arbitrary or capricious, or is otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, or (B) that an order of such agency is invalid upon a determination that the order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence. . . .

Sections 210 and 211 of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, are incorporated by reference into the Emergency Petroleum Allocation Act of 1973, (EPAA), 15 U.S.C. § 754.

⁷That threat was avoided anyway, however, since the claim was rejected on the merits by *Griffin*.

⁸28 U.S.C. § 1491 provides:

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

The district courts enjoy concurrent jurisdiction in cases involving no more than \$10,000. 28 U.S.C. § 1346.

Plaintiffs in *Griffin* responded that section 211 operated to waive the jurisdictional amount limitation contained in the Tucker Act but that it did not circumscribe the relief available to them, for their right to sue was contained in section 210, which is not limited to claims for injunctive and declaratory relief, but provides for damage claims as well. *Griffin* found plaintiffs to be "nearer the mark" on the jurisdictional issue, and held that their right to sue was indeed located in section 210. While plaintiffs herein point to language in *Griffin* that might suggest a more expansive holding, however, this court did not adopt the view that section 210 could be relied upon to support a damage claim against the United States regardless of the basis for such a claim. The court's language indicates the narrowness of the *Griffin* holding:

We believe that if or to the extent plaintiffs suffered legal wrong *because of any taking of their property* as a result of the two-tier oil pricing system, they would have the right to utilize the jurisdiction afforded in the district court by § 211 by bringing the type of action contemplated by § 210(a) for damages, there being no limitations in § 211 to the contrary.

Griffin, supra, 537 F.2d at 1136 (Emphasis added).

In reaching the conclusion that plaintiffs alleging a taking could bring an action for damages under section 210, *Griffin* made pointed reference to the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974), in which the Supreme Court confronted a similar issue. The Court was there concerned with the finding of a three-judge

district court that the Rail Act⁹ was unconstitutional because it could not be construed to incorporate the Tucker Act and therefore provided no remedy for a Fifth Amendment taking. The Court observed that the district court had viewed the problem from the wrong perspective. The proper inquiry was not whether the Rail Act had incorporated the Tucker Act but rather whether the latter Act had been affirmatively withdrawn. The Court refused to find an implied withdrawal of Tucker Act jurisdiction in the Rail Act, since a construction upholding constitutionality is favored, and withdrawal of Tucker Act jurisdiction, leaving plaintiffs without a remedy for an alleged taking, would have left the constitutionality of the Rail Act in "grave" doubt. *Regional Rail Reorganization Act Cases, supra*, 419 U.S. at 134.

The jurisdictional issue in *Griffin* arose and was resolved by this court in the context of an alleged taking of private property without just compensation. The constraints of that Fifth Amendment provision on occasion require courts to construe statutes in order to reconcile them with the constitutional requirement of just compensation, but such constructions are often of limited applicability, and they are unreliable authority for plaintiffs raising other types of claims. The observation of the Supreme Court in *United States v. Testan*, 424 U.S. 392, 401, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976), rejecting plaintiffs' attempt to find an implied waiver of sovereign immunity in the Classification Act,¹⁰ is applicable, in somewhat paraphrased form, to the instant case:

⁹Regional Rail Reorganization Act of 1973, 45 U.S.C. § 701 *et seq.*

¹⁰5 U.S.C. § 5101 *et seq.*

We perceive nothing in [*Griffin*], cited . . . with other cases centering in the Just Compensation Clause of the Fifth Amendment ("nor shall private property be taken for public use, without just compensation"), that lends support to the respondents. These Fifth Amendment cases are tied to the language, purpose, and self-executing aspects of that constitutional provision, [citation omitted], and are not authority to the effect that [§ 210] eliminates from consideration the sovereign immunity of the United States.

We thus answer the first part of the question certified in the negative. *Griffin* does not hold that section 210 provides a right of damages in suits against the government on a basis other than that of an alleged constitutional taking of property for a public purpose without just compensation. Moreover, with regard to the second part of the question before this court, we hold that, *Griffin* aside, damages are not available against the government in such suits.

Plaintiff argues that its right to procedural due process is as basic and as demanding of protection as its right to be compensated for a taking of its property for a public use. With that proposition this court has no dispute. It does not follow, however, as plaintiff would have it, that one who claims a due process violation may seek damages from the United States, for a waiver of sovereign immunity must first be established. Such a waiver is implicit in the taking clause of the Fifth Amendment, but no such waiver is contained in the due process clause. *See, e.g., Durante v. United States*, 532 F.2d 850 (2d Cir. 1976).

The government urges that a waiver of sovereign immunity must be explicit and unambiguous, and that the absence in section 210 of any reference to the United States requires us to find that the sovereign immunity remains intact. We find the test to be somewhat more generous than the government would have it, but we agree that section 210 provides plaintiff with no cause of action for damages against the United States. The relevant test has recently been described by the Supreme Court in *United States v. Testan*, *supra*, 424 U.S. at 401-02, 96 S.Ct. 948, 47 L.Ed. 2d 114:

Where the United States is the defendant and the Plaintiff is not suing for money improperly exacted or retained, the basis of the federal claim—whether it be the Constitution, a statute, or a regulation—does not create a cause of action for money damages unless, as the Court of Claims has stated, that basis “in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.” [citation omitted].

We do not find that section 210 can be fairly so interpreted. While there is scant legislative history relevant to our inquiry, what history there is indicates the intent of Congress to provide in section 210 a remedy for private parties injured by violations of the statute, and orders and regulations issued thereunder, by other private parties.¹¹ Nor can we lightly

¹¹“Section 210 provides a traditional method by which violators of regulations may be discovered and other would-be violators may be deterred. This can be accomplished

assume that Congress would have provided a cause of action for damages against the government in the circumstances of this case. To expose the FEA to damage actions based on its regulations and orders would constitute a highly unusual choice by Congress, and we will not impute such a decision to the legislature when plaintiff can offer no evidence, apart from an ambiguous statute, in support of its position.¹²

Plaintiff invokes the benefits of judicial review of agency action in support of its contention that Congress did in fact provide for damage actions against the government in section 210. There is no doubt, however, that such review exists, and plaintiff was free to demand it when it was subjected to the orders it now claims deprived it of due process and caused it financial loss. Section 211 provides the means by which a party may, upon a proper showing, invoke the power of this court or a district court to enjoin the enforcement of a regulation or order. This court and others have recognized the distinction between actions brought, for legal or equitable relief, against private parties pursuant to section 210, and actions for equitable relief against

by authorizing a person suffering a legal wrong to bring a treble damage action against the violator.

“This action is intended to be brought by private persons against other private persons. The Government will not bring such action nor be the subject of one. . . .” S.Rep. No. 92-507, 92d Cong., 1st Sess. (1971), U.S. Code Cong. & Admin. News, 2283, 2291.

¹²It is well established that, in the absence of any statutory foundation, improper regulatory action will not provide the basis for a damage action against the government unless the regulation amounts to a taking. See *Mosca v. United States*, 417 F.2d 1382, 1386 (Ct. Cl. 1969); *Eastport Steamship Corp. v. United States*, 372 F.2d 1002, 1009 (Ct.Cl. 1967) [both cases cited with approval in *United States v. Testan*, *supra*, 424 U.S. at 400].

the government pursuant to section 211.¹³ *Air Products and Chemicals, Inc. v. United Gas Pipe Line Co.*, 503 F.2d 1060, 1063 (Em.App. 1974); *McGuire Shaft & Tunnel Corp. v. Local Union No. 1791, UMW*, 475 2d 1209, 1213-14 (Em.App.), *cert. denied*, 412 U.S. 958, 93 S.Ct. 3008, 37 L.Ed. 2d 1009 (1973); *Brennan Petroleum Products Co., Inc. v. Pasco Petroleum Co., Inc.*, 373 F.Supp. 1312, 1315 (D.Ariz. 1974).

Griffin departed from this view of the statutory scheme, but it did so in order to reconcile the Act with the demands of the Fifth Amendment. No similar constraint appears in this case, and we reject plaintiff's invitation to extend *Griffin* beyond the limits of the taking clause of the Fifth Amendment.

Reversed and remanded to the district court for action consistent with this opinion.

IT IS SO ORDERED.

CHRISTENSEN, Judge, Concurring.

Fully concurring with the result reached in the prevailing opinion, as well as with most of its supporting reasoning, I add this additional comment concerning the interplay of §§ 210 and 211 of the Economic Stabilization Act.

¹³Judge Christensen states in his concurring opinion that we have altered the meaning of *Griffin* by holding that section 210 did not in fact provide the cause of action against the United States in that case. Such is not our intent. We agree that section 210, when read in conjunction with the just compensation clause of the fifth amendment, permits a person suffering legal wrong to bring an action for damages against the government. We do not agree, however, that section 210 otherwise provides the basis for actions of any type against the United States. Unless a fifth amendment taking is alleged, in which case damages may be sought under section 210, we believe that section 211 provides the proper avenue for relief against the United States.

As pointed out in *Griffin v. United States*, 537 F.2d 1130 (TECA), *cert. denied*, 429 U.S. 919 (1976), § 211 primarily relates to jurisdiction and § 210 with rights of action. Except for such "taking" claims as were involved in *Griffin*, as to which a waiver of governmental immunity was implicit in the Fifth Amendment, neither section waived that immunity. In this sense reference to the legislative history quoted in footnote 11 of the majority opinion is understandable and consistent; the limitation of the jurisdiction of the courts by § 211 to interlocutory relief in suits against the United States merely reemphasized the absence of any waiver of governmental immunity with reference to damages not constitutionally mandated.

To suggest aside from this that the wording of § 210, rather than the implied jurisdictional limitations of § 211 and absence from both sections of any express waiver of sovereign immunity, would preclude an action against the United States in appropriate cases tends unnecessarily to cloud the logical foundations of *Griffin* and the symmetry of treatment accorded by Congress to the subjects of jurisdiction and rights of action. A court's jurisdiction of a case does not necessarily assure to any person a right of action invoking that jurisdiction, nor does the existence of a right of action in and of itself establish the jurisdiction of a particular court to effectuate that right. We should not ascribe to Congress a non-perception of these distinctions which might otherwise seem convenient to unify a duplex concept.

We indeed did hold in *Griffin*, as recognized and quoted in the opinion of the court, that "to the extent plaintiffs suffered legal wrong because of any taking

of their property . . . they would have the right to utilize the jurisdiction afforded in the district court by § 211 by bringing the type of action contemplated by § 210(a) for damages, there being no limitations in § 211 to the contrary." It seems to have been recognized that the doctrine of the Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974), so required. Any indication now that such action for a taking would not be by virtue of § 210, its reference to damages being hospitable to this adaptation, but under § 211, which mentions damages not at all, could tend to erode the analysis by which we had assumed that *Griffin* dispelled the question there raised concerning the constitutionality of the Act in the "taking" context.

APPENDIX "D."

Federal Constitutional Provision, Statutes and Rules Involved.

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Administrative Procedure Act, 5 USC 702

§702. *Right of review*

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, that any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and

their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Economic Stabilization Act,

12 U.S.C. 1904 note Sections 210 and 211

§210. *Suits for damages or other relief*

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

(2) not less than \$100 or more than \$1,000; except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited

to the amount of the overcharge: Provided, That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the representation of such claim.

(c) For the purposes of this section, the term "overcharge" means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

§211. *Judicial review*

(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the cases shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

(b) (1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Except as provided in subsection (d)(2) of this Section, the court shall not have power to issue any interlocutory decree staying or restraining in whole or in part any provision of this title, or the effectiveness of any regulation or order issued thereunder. In all other respects, the court shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases over which it has jurisdiction under this title. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emer-

gency Court of Appeals within thirty days of the entry of judgment by the district court.

(c) In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.

(d) (1) Subject to paragraph (2), no regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, and no order of such agency shall be enjoined or set aside, in whole or in part unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

(2) A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it. Appeals from interlocutory decisions by a district court of the United States under this paragraph may be taken

in accordance with the provisions of section 1292(b) of title 28, United States Code; except that reference in such section to the courts of appeals shall be deemed to refer to the Temporary Emergency Court of Appeals.

(e) (1) Except as provided in subsection (d) of this section, no interlocutory or permanent injunction restraining the enforcement, operation, or execution of this title, or any regulation or order issued thereunder, shall be granted by any district court of the United States or judge thereof. Any such court shall have jurisdiction to declare (A) that a regulation of an agency exercising authority under this title is in excess of the agency's authority, is arbitrary or capricious, or is otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, or (B) that an order of such agency is invalid upon a determination that the order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

(2) Any party aggrieved by a declaration of a district court of the United States respecting the validity of any regulation or order issued under this title may, within thirty days after the entry of such declaration, file a notice of appeal therefrom in the Temporary Emergency Court of Appeals. In addition, any party believing himself entitled by reason of such declaration to a permanent injunction restraining the enforcement, operation, or execution of such regulation or order may file, within the same thirty-day period, a motion in the Temporary Emergency Court of Appeals requesting such injunctive relief. Following consideration of such appeal or motion, the Temporary Emergency Court of Appeals shall enter a final judgment

affirming, reversing, or modifying the determination of the district court and granting such permanent injunctive relief, if any, as it deems appropriate.

(f) The effectiveness of a final judgment of the Temporary Emergency Court of Appeals enjoining or setting aside in whole or in part any provision of this title, or any regulation or order issued thereunder, shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (g) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the action by the Supreme Court.

(g) Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States Court of Appeals is provided in section 1254 of title 28, United States Code. The Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title. Except as provided in this section, no court, Federal or State, shall have jurisdiction or power to consider the constitutional validity of any provision of this title or of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision

of this title authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

(h) The provisions of this section apply to any actions or suits pending in any court, Federal or State, on the date of enactment of this section in which no final order or judgment has been rendered. Any affected party seeking relief shall be required to follow the procedures of this title.

Emergency Petroleum Allocation Act of 1973,

15 USC 754(a)(1) and (2)

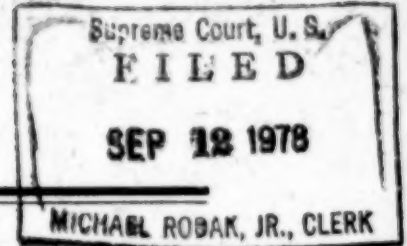
Section 5(a)(1) and (2)

(a) (1) Except as provided in paragraph (2)(A) sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on the date of enactment of this Act) shall apply to the regulation promulgated under section 4(a), to any order under this Act, and to any action taken by the President (or his delegate) under this Act, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (b) section 212 (other than 212(b) and 213 of such Act shall apply to functions under this Act to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

(2) The expiration of authority to issue and enforce orders and regulations under section 218 of such Act shall not affect any authority to amend and enforce any order under this Act, and shall not affect any authority under sections 212 and 213 insofar as such authority is made applicable to functions under this Act.

Service of the within and receipt of a copy thereof is hereby admitted this day of June, A.D. 1978.

No. 77-1748



In the Supreme Court of the United States

OCTOBER TERM, 1978

**McCULLOCH GAS PROCESSING CORPORATION,
PETITIONER**

v.

CANADIAN HIDROGAS RESOURCES, LTD., ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
TEMPORARY EMERGENCY COURT OF APPEALS OF
THE UNITED STATES**

**BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION**

**WADE H. MCCREE, JR.,
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OPINION BELOW

The opinion of the court of appeals (Pet. App. 5-18) is reported at 577 F. 2d 712.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1978. The petition for a writ of certiorari was filed on June 8, 1978. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, as added, 85 Stat. 750, 12 U.S.C. 1904 note, as incorporated by reference in Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 633, as amended, 15 U.S.C. 754(a)(1).

QUESTION PRESENTED

Whether Section 210 of the Economic Stabilization Act of 1970 or the Due Process Clause of the Fifth Amendment waives the immunity of the United States from claims for money damages that are not based on an alleged taking of property for a public purpose.

STATEMENT

Pursuant to its authority under the Emergency Petroleum Allocation Act of 1973 87 Stat. 627, as amended, 15 U.S.C. 751 *et seq.*, the Federal Energy Administration¹ issued a number of orders in 1974 and 1975 requiring petitioner to continue to supply quantities of propane gas to a number of affiliated Canadian corporations ("Hidrogas") (Pet. 6-8). Petitioner pursued an administrative appeal of those orders, and in February 1975 FEA modified its January 1975 allocation order by eliminating the emergency pricing provision contained therein (Pet. 8). Petitioner alleges that Hidrogas has not made full payment for the propane that was delivered before February 1975 (Pet. 6).

Petitioner then brought this action, seeking injunctive relief and damages against Hidrogas, the United States, and the Regional Administrator of FEA. Petitioner's claim for damages was based on its contention that FEA's orders requiring petitioner to sell propane to Hidrogas were arbitrary and capricious and therefore denied petitioner due process of law (Pet. 5-6). Petitioner contended that the district court had jurisdiction under Section 211 of the Economic Stabilization Act of 1970, as added, 85 Stat. 748, 12 U.S.C. 1904 note, and that Section

¹As of October 1, 1977, pursuant to the Department of Energy Organization Act (Pub. L. 95-91, 91 Stat. 565, to be codified in 42 U.S.C. 7101 *et seq.*) and Executive Order 12009 (42 Fed. Reg. 46267), the FEA became part of the newly established Department of Energy.

210 of the Act, as added, 85 Stat. 748, 12 U.S.C. 1904 note,² created a cause of action for damages against both private and federal defendants (Pet. 2).

The district court rejected the federal respondents' contention that sovereign immunity barred the claim for damages (Pet. App. 2) but certified the question for interlocutory appeal (Pet. App. 4).

The court of appeals reversed, holding that Sections 210 and 211 had not waived the immunity of the United States from damage claims except in cases of uncompensated taking in violation of the Fifth Amendment. The court concluded that neither the language nor the legislative history of Section 210 indicated Congress' intent to waive the sovereign immunity of the United States from claims like petitioner's that are not based on an alleged taking of property (Pet. App. 15):

To expose FEA to damage actions based on its regulations and orders would constitute a highly unusual choice by Congress, and we will not impute such a decision to the legislature when plaintiff can offer no evidence, apart from an ambiguous statute, in support of its position.

ARGUMENT

The court of appeals' decision is correct. The court applied accepted principles to the facts of this case, and there is no reason for review by this Court.

Petitioner errs in contending that Sections 210 and 211 of the Economic Stabilization Act of 1970 waived the United States' sovereign immunity from the damage

²The Emergency Petroleum Allocation Act of 1973, 87 Stat. 633, 15 U.S.C. 754(a)(1), adopts by reference the judicial review provisions of the Economic Stabilization Act, including Sections 210 and 211 of the latter Act.

claims asserted in petitioner's complaint. In *United States v. Testan*, 424 U.S. 392, 399, this Court reaffirmed the principle that "a waiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed.' *United States v. King*, [395 U.S. 1, 4]." Nothing in Sections 210 and 211 of the Economic Stabilization Act of 1970 expressly subjects the United States to damages liability.

Section 211 is principally a jurisdictional statute. Section 211(a) provides the district courts with exclusive jurisdiction over cases "arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy * * *," and Section 211(b) places exclusive appellate jurisdiction in the Temporary Emergency Court of Appeals. Section 211(d)(2) also provides that district courts may enjoin the application of regulations and orders promulgated under the statute, but it makes no reference to damages.

Section 210(a) provides in pertinent part that "[a]ny person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action * * * for appropriate relief, including an action for a declaratory judgment, writ of injunction * * * and/or damages." But Section 210 does not refer to actions against the United States, and it was plainly designed to authorize actions against private persons who violate the statute and the pricing and other regulations promulgated under it. Thus Section 210(b) relates to "any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff * * *," and subsection (c) defines "overcharge." In short, Section 210 was designed to help enforce federal regulations, not to require the United States to pay damages for promulgating regulations. Indeed, as the court of appeals observed, it would have

been "highly unusual" for Congress to have subjected the United States to damage liability arising out of the myriad regulations and orders issued under the statute without saying so in unequivocal terms (Pet. App. 15).

Contrary to petitioner's contentions, *Griffin v. United States*, 537 F. 2d 1130 (T.E.C.A.), certiorari denied, 429 U.S. 919, and the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, do not support it. In *Griffin* an oil producer contended that FEA's two-tiered system of price regulations constituted a taking of property for which the Fifth Amendment required compensation. The court of appeals concluded that Section 210 would provide a remedy for uncompensated takings. But the court explicitly restricted its holding to "takings" claims, as it explained here. Compare 537 F. 2d at 1137-1140 with Pet. App. 7-13. The two decisions do not conflict.³ Similarly the *Regional Rail Reorganization Act Cases* were concerned only with alleged takings of property. The Court simply concluded that the Rail Reorganization Act had not withdrawn a Tucker Act remedy for alleged takings of property that was otherwise available. 419 U.S. at 134-136.

Where, as in this case, a claim for damages is not based on an alleged taking of property, there is no basis for implying a waiver of traditional sovereign immunity when the statute itself does not expressly so provide. As the Court said in *Testan, supra*, 424 U.S. at 401, in rejecting an argument similar to petitioner's based on the *Rail Reorganization Act Cases* and other taking cases: "These Fifth Amendment cases are tied to the language, purpose, and self-executing aspects of [the Just Compensation

³What is more, any inconsistency between decisions of one court of appeals would be for that court to resolve. *Wisniewski v. United States*, 353 U.S. 901, 902.

Clause]* * *, and are not authority to the effect that the Tucker Act eliminates from consideration the sovereign immunity of the United States."

There is nothing to petitioner's further contention (Pet. 20-28) that the Due Process Clause—on which its damage claims are based—itself waives sovereign immunity. See *Testan, supra*, 424 U.S. at 401-402 (emphasis supplied): "Where the United States is the defendant and the plaintiff is not suing for money improperly exacted or retained, the basis of the federal claim—*whether it be the Constitution, a statute, or a regulation*—does not create a cause of action for money damages unless, as the Court of Claims has stated, that basis 'in itself * * * can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained'" (quoting *Eastport Steamship Corp. v. United States*, 372 F. 2d 1002, 1008 (Ct. Cl.)). Unlike the Just Compensation Clause, the Due Process Clause cannot "fairly be interpreted as mandating compensation * * * for the damage sustained." See *Duarte v. United States*, 532 F. 2d 850 (C.A. 2).⁴

⁴The cases cited by petitioner (Pet. 20-28) are wholly inapposite. They involve damage claims against individual officials (e.g., *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388), claims for equitable relief (*Ballard v. Laird*, 6 CCH Empl. Prac. Dec. para. 8793 (S.D. Cal.)), actions against non-government parties (*J.I. Case Co. v. Borak*, 377 U.S. 426), or claims against municipalities under 42 U.S.C. 1983 (*Monell v. Department of Social Services*, No. 75-1914, decided June 6, 1978). None involves damage claims against agencies of the federal government.

Although one of the federal respondents is an individual officer of the FEA, petitioner has not separately addressed his status and has not contended that his actions would give rise to personal liability under principles set forth in *Butz v. Economou*, No. 76-709, decided June 29, 1978. Petitioner has not alleged that respondent Arntz acted in bad faith, and because his actions were taken in the ordinary course of his duties such an allegation could not be sustained. See *Procunier v. Navarette*, 434 U.S. 555.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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